IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE
June 20, 2006 Session

STATE OF TENNESSEE v. JASON PAUL SHERWOOD

Direct Appeal from the Criminal Court for Davidson County
No. 2004-C-2268 Cheryl Blackburn, Judge

No. M2005-01883-CCA-R3-CD - Filed January 26, 2007

Following a jury trial, Defendant, Jason Paul Sherwood, was convicted of two counts of premeditated first degree murder, two counts of felony first degree murder, and one count of attempted premeditated first degree murder. The trial court merged Defendant's two convictions of felony murder with his convictions for premeditated murder, and sentenced Defendant to life with the possibility of parole for each premeditated murder conviction. Following a sentencing hearing, the trial court sentenced Defendant as a Range I, standard offender, to twenty-five years for his attempted first degree murder conviction. The trial court ordered Defendant to serve his three sentences consecutively. In his appeal, Defendant argues that (1) the trial court erred in denying his motion to suppress the evidence discovered in his vehicle and residence; (2) the trial court erred in allowing the admission of certain evidence because the State failed to establish a chain of custody; (3) the evidence is insufficient to support his convictions; (4) the trial court erred in not declaring a mistrial; and (5) the trial court erred in imposing consecutive sentencing. After a thorough review, we affirm the judgments of the trial court.

Tenn. R. App. P. 3 Appeal as of Right; Judgments of the Criminal Court Affirmed

THOMAS T. WOODALL, J., delivered the opinion of the court, in which DAVID G. HAYES and NORMA MCGEE OGLE, JJ. joined.

Ross E. Alderman, District Public Defender; Rebecca Warfield, Assistant Public Defender; Jeffrey DeVasher, Assistant Public Defender; James P. McNamara, Assistant Public Defender; Patrick Frogge, Assistant Public Defender; and Glenn Dukes, Assistant Public Defender, Nashville, Tennessee, for the appellant, Jason Paul Sherwood.

Robert E. Cooper, Jr., Attorney General and Reporter; Benjamin A. Ball, Assistant Attorney General; Victor S. (Torry) Johnson III, District Attorney General; Bret Gunn, Assistant District Attorney General; and Rob McGuire, Assistant District Attorney General, for the appellee, the State of Tennessee.

OPINION

I. Background

Diane Edge testified that her husband, Gary Edge, one of the victims, had worked for Shrum's Auto Salvage about nine months. Ms. Edge said that she was talking with her husband by telephone at approximately 4:10 p.m. on July 29, 2003, while he was at work, when she heard the sound of gunshots. Ms. Edge heard someone in the background call out that someone had a gun, and then her husband ceased talking. An individual came on the line and told her to call 9-1-1.

Sandy Haywood, an employee at Shrum's Auto Salvage, said that the company sold used automobile parts to customers. Mr. Edge and Jason Robertson, another victim, primarily dealt with customers while Mr. Haywood and Howard Frederick worked in the salvage yard dismantling vehicles. During the afternoon of July 29, 2003, Mr. Haywood and Mr. Frederick were in the salvage yard removing an engine from an automobile with a front-end loader which was driven by Mr. Frederick. Mr. Haywood testified that he heard what he thought were fireworks coming from the bay area of the company's shop. He walked toward the shop to investigate the noise while Mr. Frederick continued to operate the front-end loader. Mr. Haywood said he had taken a step or two inside the bay area when a man ran around a tow motor, pointed a gun at him, and shot him in the shoulder. Mr. Haywood turned and ran, and the man shot him in the back. Mr. Haywood identified Defendant in court as his assailant.

Mr. Haywood ran toward Mr. Frederick and yelled at him to get off the front end loader. The two men ran toward some parked vehicles and hid. Mr. Haywood said that when the shooting stopped, he walked back towards the shop and saw a white van drive by the facility. Mr. Haywood found Mr. Edge lying by the tow motor. Mr. Frederick discovered Mr. Robertson in the office bleeding from a gunshot wound.

Mr. Haywood acknowledged that he "vaguely remembered" being shown a photographic line-up in the hospital on July 29, 2003. He said that he was on pain medication and "pretty well out of it." After he was released from the hospital, Mr. Haywood saw Defendant's photograph on a televised newscast and in the newspaper, and he recognized Defendant as the shooter. On cross-examination, Mr. Haywood said that he remembered pointing to one of the photographs in the line-up, but he did not remember which photograph he had identified as the shooter.

Mr. Frederick testified that Defendant visited the salvage yard about a week before the shooting. Defendant was interested in buying an engine, and Mr. Frederick started the engine for Defendant. On the day of the shooting, Mr. Frederick said that he heard a "pop" from the shop area, but he continued working while Mr. Haywood went to investigate. Mr. Frederick said he heard another "pop," and Mr. Haywood ran out of a side door. A man, whom Mr. Frederick identified at trial as Defendant, ran behind Mr. Haywood and shot Mr. Haywood in the back. Mr. Frederick said that he saw Defendant drive away from the facility in a white van with a round "bubble" window on the rear side of the vehicle. Defendant was the only occupant in the van.

Mr. Frederick gave a description of the assailant and his van to the investigating officers at the scene. A white Ford van was found at Owl's Roost Campground after the incident. Mr. Frederick identified the van as the one driven by the shooter. Mr. Frederick acknowledged that police officers showed him a photographic line-up, and that he initially said that either the man in photograph one or the man in photograph six was the assailant. Defendant's photograph was in position six on the photographic line-up.

Chester Shrum, the owner of Shrum's Auto Salvage, testified that Defendant came to the salvage yard on June 19, 2003, to buy an engine for an S10 Chevrolet Blazer. Mr. Shrum said that he did not have an engine specifically made for that model, but he had a Pontiac Firebird engine that could be modified to run in the Blazer. Mr. Shrum said that Mr. Edge showed Defendant the Firebird engine, and Mr. Frederick started the engine for Defendant's inspection. Mr. Shrum said that Defendant believed that it would cost approximately $175.00 to modify the Pontiac engine so that it would run in his Chevrolet. Mr. Edge agreed to discount the retail price of the engine from $600.00 to $400.00 so that Defendant could afford the necessary modifications. Mr. Shrum said that Defendant purchased the engine and directed Mr. Edge to have the engine delivered to Willie Henley, a local mechanic.

Mr. Shrum said that it was the company's general policy not to refund cash to a customer when the customer returned a part, but to offer a replacement part instead. Mr. Shrum said that all of the automobile parts sold from the salvage yard were marked with the initials "S.P.C." Mr. Shrum identified the initials "S.P.C." on the engine the investigating officers recovered from Defendant's van after the shootings. Mr. Shrum did not recall that any money was taken from the cash register during the incident.

Officer Toby Sabie, of the Ridgetop Police Department, was patrolling the area near Shrum's Auto Salvage on the day of the incident when he was flagged down by Chester Shrum. Mr. Shrum told Officer Sabie what occurred at the salvage yard and Officer Sabie proceeded to the salvage yard to secure the scene until Metro police officers arrived. After talking with the witnesses, Officer Sabie used his police radio to broadcast a description of the assailant and his van. The description he broadcast was that of a "white male with a thick mustache, white tee-shirt, driving a white van with a bubble window."

The deposition of Officer Earl Douglas Hunter with the Metro Nashville Police Department was read into the record. Officer Hunter testified that three .25 caliber shell casings were found at the crime scene, one outside the door leading into the office area, one by the front bay door near a tow motor, and one by a door leading into a restroom. One projectile was discovered in the office ceiling. One live .25 caliber bullet was found on the bed of a wrecker parked in the bay area. Officer Hunter believed the bullet had been placed there by one of the emergency medical technicians. Latent fingerprints were found on the door leading to the office area.

On cross-examination, Officer Hunter said that there was a bullet hole and a partial shoe print on the office door. Officer Hunter confirmed that a neighbor found a cell phone in his front yard, but no fingerprints or traces of blood were found on the telephone.

Willie Henley testified that about a month prior to the shootings, Defendant asked him to install an engine in a 1983 Chevy Blazer. At Defendant's request, Mr. Henley picked the engine up from Shrum's Auto Salvage. Mr. Henley told Defendant that he would charge $500.00 to make the necessary modifications. Defendant told Mr. Henley that he was going to talk to Mr. Robertson at Shrum's Auto Salvage about returning the engine. Defendant reported later that Mr. Robertson would not take the engine back. Three or four weeks later, Defendant removed the engine from Mr. Henley's shop and told Mr. Henley that he was going to take it to his trailer at the Owl's Roost Campground.

Charles Heacock testified that he lived in the Owl's Roost Campground at the time of the offenses. Defendant asked Mr. Heacock to put an engine into his 1983 Chevy Blazer during the summer of 2003. Mr. Heacock said he initially told Defendant he would charge $175.00 for the job. He later raised the cost to $400.00 when he saw the amount of work needed to modify the engine so that it would fit in Defendant's vehicle. Mr. Heacock said he helped load the engine into Defendant's white Ford van around noon on July 29, 2003. Defendant told Mr. Heacock that he was going to return the engine to Shrum's Auto Salvage and get his money back. Mr. Heacock said that Defendant told him "he had it fixed up with Jason Robertson." Mr. Heacock testified that to his knowledge, there was nothing wrong with the engine other than the need for certain modifications.

Don Allen was working with Mr. Heacock on the afternoon of July 29, 2003, pulling up fence posts. Mr. Allen confirmed that Mr. Heacock helped another man load an engine into the back of a van.

Dr. Feng Li, the assistant medical examiner for Metro Nashville and Davidson County, performed the victims' autopsies. Dr. Li testified that Mr. Robertson died of multiple gunshot wounds to his head. The first bullet, which penetrated the victim's right parietal occipital region, was classified as an "instantaneous fatal gunshot wound." This bullet was recovered during the autopsy. The second wound, although less severe, was also potentially fatal. The second bullet entered the left parietal region and perforated the skull without penetrating the brain. The bullet was not recovered during the autopsy. Dr. Li stated that there was no indication that the shot was fired at close range.

Dr. Li stated that Mr. Edge died from a single gunshot wound to the head. Dr. Li described the wound as an "intermediate range, penetrating gunshot wound" to the "left frontal region" of the head. The presence of stippling around the wound indicated that the shooter was approximately two and one-half feet from the victim when the shot was fired. The downward trajectory of the bullet was consistent with the shooter standing over a seated victim. The bullet was recovered under the right side of the victim's temporal bone.

Dr. Jose Diaz was Mr. Haywood's attending physician in the Vanderbilt University Medical Center's trauma division. Dr. Diaz testified that Mr. Haywood had one gunshot wound in the anterior part of his chest, and one gunshot wound in the posterior of his upper back when he was brought into the Center. Dr. Diaz said that Mr. Haywood was given Fentanyl for pain during Life Flight to the hospital. He was given additional pain medicine during his treatment at the hospital.

Dr. Diaz explained that pain medications may have a sedating effect depending on the quantity of medicine distributed to the patient and the patient's level of tolerance. He said that Fentanyl can affect an individual's ability to make complex decisions or to complete tasks. Dr. Diaz opined that if Mr. Haywood were asked to make such decisions or perform such tasks while experiencing the effects of Fentanyl, the results of his performance may have been unreliable. He noted however, that the hospital evaluated patients for alertness and whether the patient knows where they are or can recall a date, not for whether the patient is capable of complex decision-making tasks.

Agent Doug Long, of the Tennessee Bureau of Investigation ("T.B.I."), testified that he was involved in the investigation of the shootings at Shrum's Auto Salvage. As part of that investigation, Agent Long was informed that the shooter, a white male, was driving a "white van that had round windows, glasses at the rear of the van" and to be on the look-out for a vehicle matching this description. On the evening of the shooting, Sergeant Genaro Garcia, of the Robertson County Police Department, and Agent Long were on patrol looking for the van. The officers had been given information that the driver of the van was possibly living at the Owl's Roost Campground. At approximately six o'clock p.m., the officers were parked at a service station outside the Owl's Roost Trailer Park when they saw a van matching this description traveling on an adjacent street. The van turned into the driveway of the Owl's Roost Campground. The van eventually stopped and parked next to a trailer located in the campground.

Once the van stopped, Agent Long and Officer Garcia approached the vehicle. The driver was exiting the van as the officers approached. The officers explained their reasons for approaching the van and inquired as to the driver's identity and his whereabouts that evening. The driver initially replied that he had been working at Auto Zone in Goodlettsville. He then said that he did not actually work at Auto Zone, but had been having some work done on his car. Agent Long testified that he became suspicious when the driver's story changed.

Agent Long asked the driver where he had been that day. According to Agent Long, the driver "had some significant hesitation" before answering "different places." When Agent Long inquired about what "different places" there was more "significant hesitation" and then the driver asked why he wanted to know. Agent Long described the driver's demeanor as "standoffish" and "evasive." He identified Defendant as the driver of the van. Agent Long said that he could not see inside the van through the back windows, but could see the inside rear of the van through the driver's compartment. From that vantage point, he observed "a big part of an engine or something to that effect" in the back of the van.

Sergeant Danny Orr, with the Metro Nashville Police Department, participated in a search of Defendant's trailer during the early morning hours of July 30, 2003. Sgt. Orr testified that the investigating officers recovered one box of .25 caliber Winchester bullets from inside the trailer and a pair of blue jean shorts were found in a grill outside of the trailer. Sgt. Orr also identified photographs taken during the search which reflected the contents recovered from Defendant's van, including a photograph of an engine, a tire, a pair of brown boots, and a pair of brown sandals. Sgt. Orr testified that the van "appeared to be in rough condition."

Detective Joe Williams, with the Metro Nashville Police Department, transported Mr. Frederick to Defendant's residence on the evening of July 29, 2003. Detective Williams was notified that a van matching the description given by Mr. Frederick had been identified at the Owl's Roost Trailer Park where Defendant lived. Upon arriving, Mr. Frederick identified Defendant's van as the van he had seen leaving the salvage yard after the shootings. Mr. Frederick did not observe Defendant during this identification of the van. Detective Williams subsequently showed Mr. Frederick a photographic line-up which contained Defendant's photograph in position six of the line-up. Mr. Frederick said that either photograph one or photograph six could be the assailant.

Detective Williams said that he visited Mr. Haywood in the hospital later that night. Mr. Haywood was sitting up, staring straight ahead, and appeared confused and in a "zombie state." The attending nurse told Detective Williams that Mr. Haywood had been given medicine for pain. Detective Williams showed Mr. Haywood the same photographic line-up that he had shown Mr. Frederick. Mr. Haywood said that the man in photograph number four looked familiar, but he was not sure. Detective Williams telephoned Mr. Haywood for an interview after he was released from the hospital. Over the telephone, Mr. Haywood told Detective Williams that he had seen Defendant on a televised newscast, and that he recognized Defendant as his assailant. Detective Williams interviewed Mr. Haywood later that day. Mr. Haywood said that he was certain that the man he had seen on the television was his assailant.

Detective Williams confirmed that none of Defendant's fingerprints were found at the crime scene. He also testified that the blue jean shorts discovered in the grill at Defendant's residence did not reveal the presence of any blood. Linda Littlejohn, with the T.B.I.'s crime lab, testified that the shoes found in Defendant's van were inconsistent with the partial shoe print on the door recovered from the crime scene.

Officer Michael Baker, with the Metro Nashville Police Department, testified that the bullets recovered during the victims' autopsies, and the three casings recovered from the crime scene, were fired from the same gun. Officer Baker said that the bullets and casings were .25 caliber and consistent with the .25 caliber Winchester bullets discovered in Defendant's home.

The State rested its case-in-chief. Sally Sherman, a fingerprint identification analyst with the Metro Nashville Police Department was called as a defense witness. Ms. Sherman confirmed that none of the latent fingerprints recovered at the crime scene matched Defendant's fingerprints.

II. Motion to Suppress

A. Lack of Specificity

Defendant argues that the two search warrants obtained by the investigating officers which authorized the search of his home and motor vehicle were constitutionally infirm for lack of specificity as to the property to be seized. Both search warrants and affidavits are printed on the same form with the affidavit on the back of the form. One search warrant authorizes the search of a "Tradewind Air Stream ___ Camper, Serial number 242D957, marked 777, located on lot 32 @ the Owls Roost Campground, located @ 7267 Bethel Road, Robertson County, Tennessee." The other search warrant authorizes the search of "a Ford van, white in color, displaying tag number MGZ-421, having a V.I.N. # [sic] 1FTDE04YXDHA13719. Located @ lot 32 of the Owl's Roost Campground, located @ 7267 Bethel Rd., Robertson County, Tennessee. Both warrants state:

> Proof by affidavit having been made before me by **Detective E. J. Bernard** that there is probable and reasonable cause to believe that **Jason Paul Sherwood** is now in possession and control of certain evidence of a crime, to wit: **Evidence of a criminal homicide**.

The affidavit on the back of each search warrant form states that:

> Personally appeared before me, **Detective E. J. Bernard**, and made oath in the form of law that there is probable and reasonable cause to believe that **Jason Paul Sherwood** is now in possession of certain evidence of a crime, to wit: **Evidence of criminal homicide**.

A notation is made on the affidavit attached to each search warrant to "see attached affidavit" which is a second affidavit entitled "Affidavit of Probable Cause" and details the sequence of events which led the investigating officers to Defendant's residence. The affidavit does not specifically list the property to be seized during the search of Defendant's Ford van and camper, but it states that "[e]vidence was found at the crime scene to indicate the caliber and type of firearm used in the crime, also evidence to indicate what type of footwear was worn by the suspect. Furthermore latent prints recovered possibly belong to the suspect." The affidavit further stated that a witness at the scene saw the shooter flee the scene in "an older model van" described as "flat white in color, having a round port hole 'Bubble' type window on the side."

At the conclusion of the suppression hearing, the trial court denied Defendant's motion to suppress, stating that:

> [t]his Court agrees with the defense that the phrase "evidence of a criminal homicide" stated alone without a list of possible items is very general. . . . Here, when the search warrant is construed with the affidavit, it is clear that the warrant authorized the seizure of items relating to shooting such as a firearm, ammunition, bloody clothing,

> footwear (the affidavit notes footwear evidence was found at the crime scene). The Court, therefore, concludes that while the phrase "evidence of a criminal homicide" *may* not be sufficiently specific, the affidavit was incorporated in the warrant and cures any possible deficiencies.

The trial court further found that even if the search warrant for Defendant's van was invalid, the investigating officers "could conduct a warrantless search of the vehicle since they had probable cause to believe the van contained evidence related to the shooting."

A trial court's findings of fact in a suppression hearing will be upheld on review unless the evidence preponderates otherwise. *State v. Odom*, 928 S.W.2d 18, 23 (Tenn. 1996). The prevailing party in the trial court is "entitled to the strongest legitimate view of the evidence adduced at the suppression hearing as well as all reasonable and legitimate inferences that may be drawn from that evidence." *Id*. The defendant bears the burden of demonstrating that the evidence preponderates against the trial court's findings. *Id*. However, we review the trial court's application of the law to the facts *de novo*, without any deference to the determinations of the trial court. *State v. Walton*, 41 S.W.3d 75, 81 (Tenn. 2001). Both the evidence presented at the suppression hearing and the proof adduced at trial may be considered in reviewing a trial court's ruling on a motion to suppress. *See State v. Henning*, 975 S.W.2d 290, 299 (Tenn. 1998).

"The Fourth Amendment requires a search warrant to contain a particular description of the items to be seized." *State v. Meeks*, 867 S.W.2d 361, 371 (Tenn. Crim. App. 1993) (citing *Marron v. United States*, 275 U.S. 192, 48 S. Ct. 74, 72 L. Ed. 231 (1927)). "Similarly, the Tennessee Constitution mandates that a search warrant must "particularly describe" property to be searched to pass constitutional muster." *State v. Mack*, 188 S.W.3d 164, 172 (Tenn. Crim. App. 2004); *see also* T.C.A. § 40-6-103 (Providing that "[a] search warrant can only be issued on probable cause, supported by affidavit, naming or describing the person, and *particularly describing the property* and placed to be searched) (emphasis added). "This requirement serves as a limitation, both upon governmental intrusion into a citizen's privacy and property rights and upon the discretion of law enforcement officers conducting the search." *State v. Reid*, 91 S.W.3d 247, 273 (Tenn. 2002). To satisfy the particular description requirement, a warrant "'must enable the searcher to reasonably ascertain and identify the things which are authorized to be seized.'" *Meeks*, 867 S.W.2d at 372 (quoting *United States v. Cook*, 657 F.2d 730, 733 (5th Cir.1981)); *see also Henning*, 975 S.W.2d at 296. In *Lea v. State*, our Supreme Court observed as follows:

> [W]here the purpose of the search is to find specific property, it should be so particularly described as to preclude the possibility of seizing any other. On the other hand, if the purpose be to seize not specified property, but any property of a specified character which, by reason of its character, and of the place where and the circumstances under which it may be found, if found at all, would be illicit, a description, save as to such character, place and circumstances, would be unnecessary, and ordinarily impossible.

181 Tenn. 378, 382-83, 181 S.W.2d 351, 352-53 (1944).

We note, as did the trial court, that a supporting affidavit may be utilized to cure deficiencies in the warrant itself if the affidavit is specifically incorporated in the warrant, or a definite reference is made in the warrant to the affidavit. *Hackerman v. State*, 189 Tenn. 130, 134-35, 223 S.W.2d 194, 196 (1949); *State v. Lowe*, 949 S.W.2d 300, 304 (Tenn. Crim. App. 1996). However, in Tennessee, an affidavit "is not considered an actual part of the warrant, even if it appears on the same printed form as the warrant" without incorporation by the warrant itself. *Lowe*, 949 S.W.2d at 303 (citing *State v. Smith*, 836 S.W.2d 137, 141 (Tenn. Crim. App. 1992)). In the instant case, the warrants in question do not specifically incorporate or reference the attached affidavits. Rather, the directive to "see attached affidavit," i.e. the "Affidavit of Probable Cause," is made in the affidavits on the back of each search warrant. Because there is no reference incorporating the affidavits in either of the search warrants, the affidavits may not be construed to bolster deficiencies in the warrant. Accordingly, we will determine the sufficiency of the description of the property to be seized based on the quoted language contained in the body of the warrant alone.

Under the principles enunciated in *Lea*, this Court has previously observed, for example, that a search warrant must not only describe property as "stolen" but must refer to the property by its specific character, such as stereos or tape recorders. *State v. Johnson*, 854 S.W.2d 897, 900 (Tenn. Crim. App. 1993). A search warrant "authorizing a search for and seizure of 'evidence of the crime or crimes of armed robbery'" without providing a list of the items that might qualify would fail to meet the specificity requirement. *Meeks*, 867 S.W.2d at 371. Thus, we conclude that the search warrants in the case *sub judice* authorizing, without more specificity, the seizure of "evidence of a criminal homicide" are invalid.

Even if the items in Defendant's van were improperly seized pursuant to an invalid search warrant, these items, which include two pairs of shoes and an automobile engine, would still be admissible because the van could properly have been searched during the initial stop by Agent Long and Detective Garcia. Both the Fourth Amendment to the United States Constitution and article 1, section 7 of the Tennessee Constitution prohibit unreasonable searches and seizures by law enforcement officers. The purpose of the Fourth Amendment and article 1, section 7 is to "'safeguard the privacy and security of individuals against arbitrary invasions of government officials.'" *State v. Munn*, 56 S.W.3d 486, 494 (Tenn. 2001) (quoting *State v. Bridges*, 963 S.W.2d 487, 490 (Tenn. 1997)). Under both constitutions, "'a warrantless search or seizure is presumed unreasonable, and evidence discovered as a result thereof is subject to suppression unless the State demonstrates that the search or seizure was conducted pursuant to one of the narrowly defined exceptions to the warrant requirement.'" *State v. Binette*, 33 S.W.3d 215, 218 (Tenn. 2000) (quoting *State v. Yeargan*, 958 S.W.2d 626, 629 (Tenn. 1997)); *see also Coolidge v. New Hampshire*, 403 U.S. 443, 454-55, 91 S. Ct. 2022, 2032 (1971).

One such exception to the warrant requirement is the "automobile exception." Under the automobile exception, an automobile may be searched without a warrant if an officer has probable cause to believe that the vehicle contains contraband and if exigent circumstances require an immediate search. *State v. Leveye*, 796 S.W.2d 948, 952 (Tenn. 1990). The rationale for the automobile exception is two-fold: (1) the impracticability of obtaining a search warrant in light of the

inherent mobility of an automobile; and (2) the reduced expectation of privacy with respect to one's automobile. *California v. Carney*, 471 U.S. 386, 390-93, 105 S. Ct. 2066, 2069-70 (1985); *South Dakota v. Opperman*, 428 U.S. 364, 367, 96 S. Ct. 3092, 3096, 49 L. Ed. 2d 1000 (1976). If the police have probable cause to believe that an automobile contains contraband, the officers may either seize the vehicle and then obtain a warrant or they may search the vehicle immediately. *Chambers v. Maroney*, 399 U.S. 42, 52, 90 S. Ct. 1975, 1981, 26 L. Ed.2d 419 (1970). "[T]he right to search and the validity of the seizure are not dependent on the right to arrest. They are dependent on the reasonable cause the seizing officer has for belief that the contents of the automobile offend against the law." *Reagan v. State*, 525 S.W.2d 683, 686 (Tenn. Crim. App. 1974) (citing *Chambers v. Maroney*, 399 U.S. at 49, 90 S. Ct. at 1980). "Given probable cause to search, either course is reasonable under the Fourth Amendment." *Chambers*, 399 U.S. at 52, 90 S. Ct. at 1981. "Probable cause has been defined as a reasonable ground for suspicion, supported by circumstances indicative of an illegal act." *State v. Henning*, 975 S.W.2d 290, 294 (Tenn. 1998).

Based on our review of the record, we conclude that Agent Long and Detective Garcia had reasonable suspicion for the initial investigative stop of the van. *Terry v. Ohio*, 392 U.S. 1, 20-21, 88 S. Ct. 1868, 1879, 20 L. Ed. 2d 889 (1968); *State v. Randolph*, 74 S.W.3d 330, 334 (Tenn. 2002). The officers were aware that a shooting had occurred at a salvage yard approximately two hours prior. They had knowledge that the suspect was a white male who left the scene driving a white van with bubble windows. Information that the suspect was possibly living at the Owl's Roost Campground was also broadcast over the police radio. With this knowledge, the officers parked at a service station near the Owl's Roost Campground. A van, which matched the description the officers had been given, approached the service station and turned into the campground. Agent Long and Officer Garcia followed the van until it stopped at a trailer. The driver's physical appearance matched the general description of the shooter provided by Mr. Frederick. When questioned about his whereabouts that day, the driver gave contradictory responses raising the officers' suspicion. Agent Long observed an engine in plain view through the driver's compartment of the van. The van, the driver, and the engine, coupled with the knowledge that a shooting had occurred two hours prior at a salvage yard, gave the officers probable cause to search the van. The existence of probable cause, together with the exigency created by the van's mobility, justified a warrantless search of the van for constitutional purposes. *Chambers*, 399 U.S. at 49, 90 S. Ct. at 1980.

Relying on *Fuqua v. Armor*, 543 S.W.2d 64 (Tenn. 1976), Defendant argues that no exigent circumstances existed to support a warrantless search of his vehicle because he was parked on private property when he was approached by the investigating officers. In *Fuqua*, the court equated the exigent circumstances necessary to support a warrantless search of a vehicle to a vehicle moving "on the public highway which makes it impracticable to obtain a search warrant and does not apply to authorize a search or seizure of a vehicle without a warrant after the vehicle has completed its journey and is at rest on private premises." *Id.* at 66. In *Leveye*, issued three years after *Fuqua*, our supreme court adopted the interpretation set forth in *Carney* and held that the inherent mobility of vehicles creates a conclusive presumption of exigency provided the police officers have probable cause to believe the vehicle contains contraband. *Leveye*, 796 S.W.2d at 952-53. (citing *Carney*, 471 U.S. at 392-93, 105 S. Ct. at 2069). As Defendant submits, the *Leveye* court observed that "[d]istinctions

may be made by the Court in future cases between vehicles parked in public places and elsewhere." *Id*. at 952. Nonetheless, even under *Fuqua*'s pre-*Carney* exigency analysis, our supreme court had previously observed that "[t]o claim that *Fuqua* stands for the proposition that exigent circumstances can never occur in relation to a car parked on private property is erroneous," noting that the automobile in question in *Fuqua* "had been parked in the same place in a driveway for three weeks, and at a time when the defendant was in custody." *State v. Byerley*, 635 S.W.2d 511, 515 (Tenn. 1982).

Although the officers had grounds for a warrantless search of the van, the search was delayed in order that a search of the van could be conducted pursuant to a warrant. The fact that the warrant was defective did not invalidate the subsequent search since Agent Long and Officer Garcia could have conducted a legal search of the van without the warrant. For constitutional purposes, there is no distinction between conducting an immediate search of an automobile and seizing and holding an automobile pending determination of probable cause by a magistrate. *Mathis v. State*, 566 S.W.2d 285, 287 (Tenn. Crim. App. 1977). Thus, we find no error in the introduction into evidence of the automobile engine and the two pairs of shoes which were found in Defendant's van because they could lawfully have been discovered pursuant to the automobile exception to the warrant requirement.

Although the search of Defendant's van was lawful, we cannot conclude that the warrantless search of Defendant's trailer was supported by one of the limited exceptions to the warrant requirement. Thus, we conclude that the trial court erred in allowing the introduction into evidence of the pair of blue jean shorts found in a grill outside Defendant's trailer and the box of .25 caliber Winchester bullets found inside the trailer. However, considering the record as a whole and the overwhelming evidence against Defendant, we conclude that such error was harmless beyond a reasonable doubt. Tenn. R. App. P. 36(b); Tenn. R. Crim. P. 52(a).

Two eyewitnesses from the salvage yard identified Defendant as the shooter. One of these witnesses also identified Defendant's van as the van he saw leaving the salvage yard following the shooting. Mr. Shrum testified that he and one of the victims had previously sold Defendant a Chevrolet Firebird engine. Mr. Shrum also testified that all of the parts and machinery sold by the salvage yard were labeled with the initials "S.P.C." Mr. Henley testified that Defendant spoke with him about installing the Firebird engine in a Chevrolet Blazer. When Defendant learned how much the work was going to cost, he said he was going to return the engine to Shrum's Auto Salvage and removed the engine from Mr. Henley's shop.

Mr. Heacock testified that Defendant had also spoken to him about installing the engine, but was dissatisfied with how much it was going to cost. On the day of the incident, Mr. Heacock helped Defendant load the engine into Defendant's white Ford van. Mr. Heacock testified that Defendant told him he was going to the salvage yard to get his money back and that "he had it fixed up with Jason Robertson." Mr. Allen testified that on the day of the incident he saw Mr. Heacock assist someone in loading an engine into a white van. A search of Defendant's van following the shooting revealed an automobile engine with the initials "S.P.C." Mr. Shrum identified the engine as the one he sold to Defendant.

Under our case law, a conviction may be based entirely upon circumstantial evidence. *Duchac v. State*, 505 S.W.2d 237, 241 (Tenn. 1974). In such cases, however, the facts must be "so clearly interwoven and connected that the finger of guilt is pointed unerringly at the Defendant and the Defendant alone." *State v. Black*, 815 S.W.2d 166, 175 (Tenn. 1991) (citing *State v. Duncan*, 698 S.W.2d 63, 67 (Tenn. 1985)). After a thorough review of the record, we conclude that the finger of guilt is without doubt pointed at Defendant. The eyewitness testimony together with the corroborating evidence provides a solid link between Defendant and the crime. It is for this reason, that we conclude the admission of the bullets and other items from the trailer constituted harmless error. Tenn. R. App. P. 36(b); Tenn. R. Crim. P. 52(a).

B. Material Omissions and Mischaracterization of Defendant's Statements

Defendant argues that the supporting affidavit contained a material omission of exculpatory information. Specifically, he asserts that the affiant failed to disclose that the witness who provided the description of the van seen leaving the scene of the shooting gave an inaccurate description of the shooter. Defendant also contends that it was misleading for the affiant to characterize Defendant's statement to the affiant that he was working at an Auto Zone store on the afternoon of the shooting as "contradictory."

In *State v. Little*, 560 S.W.2d 403, 407 (Tenn. 1978), our supreme court held that "there are two circumstances that authorize the impeachment of an affidavit sufficient on its face, (1) a false statement made with intent to deceive the Court, whether material or immaterial to the issue of probable cause, and (2) a false statement, essential to the establishment of probable cause, recklessly made." This court has observed that the same rationale of the *Little* test extends to material omissions in an affidavit. *See State v. Yeomans*, 10 S.W.3d 293, 297 (Tenn. Crim. App. 1999). "However, an affidavit omitting potentially exculpatory information is less likely to present a question of impermissible official conduct than one which affirmatively includes false information." *Id*. The appellant bears the burden of establishing the allegation of perjury or reckless disregard by a preponderance of the evidence. *Id.*

Detective Williams testified at the suppression hearing that he interviewed Mr. Frederick after the shooting. Mr. Frederick described the shooter as a white male, approximately six feet four inches tall, weighing approximately 180 pounds, and wearing either a mustache or a goatee. Detective Williams stated that Mr. Frederick was not sure about the shooter's physical description, however, because he was on top of the front end loader when he saw the shooter and this distorted his perspective. Detective Williams said that he boarded the front end loader and looked down from Mr. Frederick's vantage point. Based on Mr. Frederick's uncertainty and his own personal observations, Detective Williams omitted Mr. Frederick's estimate as to the shooter's height and weight from the affidavit. Detective Williams stated that the primary focus of the initial investigation was based on Mr. Frederick's description of the van seen leaving the crime scene.

Based on our review, we conclude that the omission of information relating to Mr. Frederick's initial estimate of the shooter's height and weight does not invalidate the warrant. There is no evidence in the record that Detective Williams intentionally or recklessly withheld information he considered to be material. Defendant is not entitled to relief on this issue.

With respect to the affiant's characterization of Defendant's statements, the affidavit states, "Sergeant Garcia and T.B.I. Special Agent Doug Long began to question [Defendant] about his whereabouts for the evening. [D]efendant was vague and contradicted himself during the interview."

Agent Long testified at the suppression hearing that he identified himself to Defendant and asked about his activities that day. Defendant initially said that he had been working at Auto Zone in Goodlettesville. In response to further questioning, Defendant then said that he was not actually an Auto Zone Company employee but had been working on his car at the company's facility. Agent Long said that he asked Defendant what else he had done that day, and Defendant said "he had been at different places," but he chose not identify the locations by name.

Based on our review of the record, the evidence does not preponderate against the trial court's finding that Agent Long's characterization of Defendant's explanations as vague and contradictory was not made recklessly or with an intent to deceive. Moreover, we cannot conclude that Agent Long's characterization was essential to the establishment of probable cause. Defendant is not entitled to relief on this issue.

III. Chain of Custody

Defendant next argues that because the State did not establish an unbroken chain of custody, the trial court erred in admitting into evidence a box of .25 caliber Winchester bullets found by the investigating officers during a search of his residence. Defendant submits that the officer's report states that he recovered a box of forty-eight bullets when the number of bullets in the box collected at the scene was actually thirty-eight. He asserts that the State failed to offer "an explanation on the record regarding the discrepancy." Although we have already held that this evidence should have been suppressed as a result of the invalid search warrant, we will address this issue in the event of further review.

Rule 901(a) requires that, prior to the introduction of physical evidence, a witness must be able to identify the evidence or establish an unbroken chain of custody. *State v. Holbrooks*, 983 S.W.2d 697, 701 (Tenn. Crim. App. 1998); *State v. Goodman*, 643 S.W.2d 375, 381 (Tenn. Crim. App. 1982). "The purpose of the chain of custody is to 'demonstrate that there has been no tampering, loss, substitution, or mistake with respect to the evidence.'" *State v. Scott*, 33 S.W.3d 746, 760 (Tenn. 2000) (quoting *State v. Braden*, 867 S.W.2d 750, 759 (Tenn. Crim. App.1993)). However, the State is not required to prove the identity of tangible evidence beyond all possibility of doubt, neither is the state required to exclude every possibility of tampering. *Id*. Rather, "[t]he evidence may be admitted when the circumstances surrounding the evidence reasonably establish the identity of the evidence and its integrity." *Id.; see also State v. Holloman*, 835 S.W.2d 42, 46 (Tenn. Crim. App.

1992). Whether the requisite chain of custody has been sufficiently established is a matter committed to the discretion of the trial judge, and his ruling will not be reversed on appeal absent a finding of abuse of that discretion. *State v. Beech*, 744 S.W.2d 585, 587 (Tenn. Crim. App. 1987).

The box of bullets was introduced through Sergeant Orr's testimony. Sergeant Orr testified that he collected a box of .25 caliber Winchester bullets from Defendant's trailer during the execution of the search warrant. Sergeant Orr stated that he erroneously recorded the number of bullets in the box as forty-eight in his report. He testified that the actual number of bullets was thirty-eight. Sergeant Orr collected the bullets, photographed them, and then repackaged the bullets in the box. The photograph introduced into evidence displays thirty-eight bullets. The box in which Sergeant Orr placed the bullets was introduced into evidence, and Sergeant Orr confirmed that the box contained thirty-six bullets at the time of trial. Officer Baker testified that two of the bullets from the box were broken down and used for comparison purposes against the bullets found at the scene. The evidence does not preponderate against the trial court's finding that the State sufficiently established the requisite chain of custody for the box of .25 caliber Winchester bullets. Defendant is not entitled to relief on this issue.

IV. Sufficiency of the Evidence

Defendant was convicted of two counts of premeditated first degree murder, two counts of felony murder, and one count of attempted premeditated first degree murder. The felony murder convictions were merged with the premeditated first degree murder convictions for purposes of sentencing. In his appeal, Defendant challenges the sufficiency of the evidence identifying him as the perpetrator of the offenses, and, alternatively, Defendant argues that the evidence is insufficient to support a finding that he acted with premeditation.

In reviewing Defendant's challenge to the sufficiency of the convicting evidence, we must review the evidence in a light most favorable to the prosecution in determining whether a rational trier of fact could have found all the essential elements of the crime beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S. Ct. 2781, 2789, 61 L. Ed. 2d 560, 573 (1979). Once a jury finds a defendant guilty, his or her presumption of innocence is removed and replaced with a presumption of guilt. *State v. Black*, 815 S.W.2d 166, 175 (Tenn. 1991). The defendant has the burden of overcoming this presumption, and the State is entitled to the strongest legitimate view of the evidence along with all reasonable inferences which may be drawn from that evidence. *Id*.; *State v. Tuggle*, 639 S.W.2d 913, 914 (Tenn. 1982). The jury is presumed to have resolved all conflicts and drawn any reasonable inferences in favor of the State. *State v. Sheffield*, 676 S.W.2d 542, 547 (Tenn. 1984). Questions concerning the credibility of witnesses, the weight and value to be given the evidence, and all factual issues raised by the evidence are resolved by the trier of fact and not this court. *State v. Bland*, 958 S.W.2d 651, 659 (Tenn. 1997). These rules are applicable to findings of guilt predicated upon direct evidence, circumstantial evidence, or a combination of both direct and circumstantial evidence. *State v. Matthews*, 805 S.W.2d 776, 779 (Tenn. Crim. App 1990).

A. Identity Evidence

"The identity of the perpetrator is an essential element of any crime." *State v. Rice*, 184 S.W.3d 646, 662 (Tenn. 2006) (citing *State v. Thompson* 519 S.W.2d 789, 793 (Tenn. 1975)). Mr. Fredericks initially told the investigating officers that Defendant wore a mustache instead of a goatee, and both Mr. Haywood and Mr. Fredericks failed to conclusively identify Defendant as the shooter from photographic line-ups which were shown to them a few days after the offenses. Nonetheless, both witnesses identified Defendant at trial as the shooter. Mr. Haywood testified that he was approximately six to eight feet from Defendant when Defendant shot him the first time in the shoulder. Mr. Frederick testified that he observed Mr. Haywood run out of the shop followed by Defendant. Mr. Frederick said that Defendant was two to three feet from Mr. Haywood when Defendant shot Mr. Haywood in the back. Mr. Frederick said that he was able to see the driver of the van which left the scene immediately after the shooting and identified Defendant at trial as the driver. Defense counsel throughly cross-examined Mr. Haywood and Mr. Frederick concerning their pre-trial identifications, and the jury obviously accredited any conflicts by its verdict in favor of the State's witnesses as was its prerogative. Based on our review of the record, we conclude that the evidence is sufficient for a rational trier of fact to find beyond a reasonable doubt the Defendant was the perpetrator of the charged offenses. Defendant is not entitled to relief on this issue.

B. Premeditation

As relevant here, the offense of first degree murder is defined as "a premeditated and intentional killing of another." T.C.A. § 39-13-202(a)(1). A person acts intentionally with respect to . . . a result of the conduct when it is the person's conscious objective or desire to . . . cause the result." *Id*. § 39-13-302(a). A premeditated act is one "done after the exercise of reflection and judgment." *Id*. § 39-13-202(d). "'Premeditation' means that the intent to kill must have been formed prior to the act itself. It is not necessary that the purpose to kill pre-exist in the mind of the accused for any definite period of time." *Id*. "A person commits criminal attempt who, acting with the kind of culpability otherwise required for the offense . . . [a]cts with intent to complete a course of action or cause a result that would constitute the offense, under the circumstances surrounding the conduct as the person believes them to be, and the conduct constitutes a substantial step toward the commission of the offense." *Id*. § 39-12-101(a)(3). "Conduct does not constitute a substantial step under subdivision (a)(3) unless the person's entire course of action is corroborative of the intent to commit the offense." *Id*. § 39-12-101(b).

Defendant argues that there is no evidence as to what transpired immediately prior to the shooting, and no evidence that Defendant had any intent other than to return the engine to Shrum's Auto Salvage. Because there is rarely direct evidence as to the state of a defendant's mind at the time of an offense, however, it is proper to infer intent and premeditation from the circumstances surrounding the attack. *State v. Lowery*, 667 S.W.2d 52, 57 (Tenn. 1984); *State v. Inlow*, 52 S.W.3d 101, 105 (Tenn. Crim. App. 2000). Circumstances from which premeditation may be inferred include the defendant's "use of a deadly weapon upon an unarmed victim; the particular cruelty of the killing; declarations by a defendant of an intent to kill; the defendant's procurement of a weapon; a

defendant's preparations prior to a killing for concealment of the crime; and calmness immediately after the killing." *State v. Pike*, 978 S.W.2d 904, 914 (Tenn. 1998) (citing *Bland*, 958 S.W.2d at 660).

Viewing the following in a light most favorable to the State, the evidence shows that Defendant purchased an automobile engine from Shrum's Auto Salvage approximately five weeks prior to the shootings. Mr. Robertson, one of the victims, sold Defendant the engine and discounted the engine's purchase price because the engine needed modifications in order for it to operate in Defendant's Chevrolet Blazer. Defendant told Mr. Shrum he thought the modifications would cost $175.00. Defendant first took the engine to Mr. Henley who told Defendant he would modify the engine for $500.00. Defendant told Mr. Henley that he would talk to Mr. Robertson about returning the engine but later told Mr. Henley that Mr. Robertson would not refund the engine's purchase price. Defendant removed the engine from Mr. Henley's shop three or four weeks later without the modifications. Defendant next asked Mr. Heacock to work on the engine, and Mr. Heacock told Defendant he would charge $400.00 for the job. On the afternoon of the shootings, Mr. Heacock helped Defendant load the engine into the back of Defendant's van. Defendant told Mr. Heacock that he was going to return the engine to Shrum's Auto Salvage, and that "he had fixed it up" with Mr. Robertson.

At approximately 4:10 p.m., Ms. Edge was talking with Mr. Edge by telephone when she heard gunfire. All three victims were unarmed and were shot in different locations of the salvage facility. Mr. Edge, who was found in the shop's bay area, and Mr. Robertson, who was found in the shop's office area, died from gunshot wounds to the head. Mr. Haywood stepped inside the bay to investigate the noises he had heard. Defendant ran around a tow motor, shot Mr. Haywood once in the shoulder, then pursued Mr. Haywood out of the building and shot him a second time in the back as Mr. Haywood attempted to flee. Tests revealed that the casings found at the crime scene and the bullets recovered during the autopsies of Mr. Edge and Mr. Robertson were fired from the same gun.

Based on the foregoing, we conclude that a rational trier of fact could conclude beyond a reasonable doubt that Defendant acted with the requisite premeditation during the commission of the offenses, and that Defendant was guilty of the offenses of the premeditated first degree murder of Mr. Edge and Mr. Robertson, and the attempt to commit the premeditated first degree murder of Mr. Haywood. Defendant is not entitled to relief on this issue.

V. Jury Issues

Defendant contends that the trial court erred when it failed to declare a mistrial after it was discovered that there had been an improper influence on the jury committed by both the court officer and Defendant himself. Defendant acknowledges that he did not raise an objection at the time Defendant's intrusion into the jury room occurred, but asks this Court to review this issue as "plain error" pursuant to Rule 52(b) of the Tennessee Rules of Criminal Procedure.

Rule 52(b) of the Tennessee Rules of Criminal Procedure provides that "[a]n error which has affected the substantial rights of an accused may be noticed at any time, even though not raised in the

motion for new trial or assigned as error on appeal, in the discretion of the appellate court where necessary to do substantial justice." This Court in *State v. Adkisson*, 899 S.W.2d 626 (Tenn. Crim. App. 1994), set forth the following prerequisites for finding plain error:

> a) the record must clearly establish what occurred in the trial court;
>
> b) a clear and unequivocal rule of law must have been breached;
>
> c) a substantial right of the accused must have been adversely affected;
>
> d) the accused did not waive the issue for tactical reasons: and
>
> e) consideration of the error is 'necessary to do substantial justice.

Id. at 641-642. "All five factors must be established by the record before" an appellate court may "recognize the existence of plain error, and complete consideration of all the factors is not necessary when it is clear from the record that at least one of the factors cannot be established." *State v. Smith*, 24 S.W.3d 274, 283 (Tenn. 2000)).

The trial court was notified that an incident had occurred in the jury room after the jury had reached a verdict. In a hearing outside the presence of the jury, Officer Bills testified as follows:

> [THE COURT]: Okay, Mr. Bills, if you would – after you were notified that the jury had a verdict, would you please just put, for the record, what happened.
>
> [MR. BILLS]: I was inside the verdict [sic] room with the jurors, discussing –
>
> [THE COURT]: You were inside the jury room?
>
> [MR. BILLS]: Yes, discussing what was going to happen when they came out here. The door opened. [Defendant] walked in. I immediately grabbed him. As I was dragging him out of the room, [Defendant] stated, I'm not guilty.
>
> [THE COURT]: All right. He actually went into the jury room?
>
> [MR. BILLS]: Yes, ma'am, he did.
>
> [THE COURT]: How far into the jury room did he get?
>
> [MR. BILLS]: Less than two feet.

[THE COURT]: All right, but you had – the verdict has already been – you had already been notified that there was a verdict at this point.

[MR. BILLS]: Yes, ma'am.

When the jury returned to the courtroom, the trial court asked the foreperson if the jury had already reached a verdict and signed the verdict form when Defendant entered the jury room. The foreperson replied in the affirmative. The trial court then polled each individual juror as to whether Defendant's conduct had any affect on the verdict, and each juror responded that it had not.

Rule 606(b) of the Tennessee Rules of Evidence provides that:

> Upon an inquiry into the validity of a verdict or indictment, a juror may not testify as to any matter or statement occurring during the course of the jury's deliberations or to the effect of anything upon any juror's mind or emotions as influencing that juror to assent to or dissent from the verdict or indictment or concerning the juror's mental processes, except that a juror may testify on the question of whether extraneous prejudicial information was improperly brought to the jury's attention, whether any outside influence was improperly brought to bear upon any juror, or whether the jurors agreed in advance to be bound by a quotient or gambling verdict without further discussion; nor may a juror's affidavit or evidence of any statement by the juror concerning a matter about which the juror would be precluded from testifying be received for these purposes.

The "overreaching purpose of both the federal rule and Tennessee Rule 606(b) is to protect the integrity of the jury's deliberative process." *Walsh v. State*, 166 S.W.3d 641, 646 (Tenn. 2005). The *Walsh* court thus concluded that Rule 606(b) "permits juror testimony to establish the fact of extraneous information or improper influence on the jury; however, juror testimony concerning the effect of such information or influence on the juror's deliberative process is inadmissible." *Id*. at 649. If juror testimony establishes such an improper influence, then a presumption of prejudice to the defendant is raised which must be sufficiently rebutted by the State in order to avoid reversible error. *Id*.

We observe initially that under *Walsh*, it was improper for the trial court to poll the jury as to the effect of Defendant's presence in the jury room on their decision making process, but that does not end our inquiry. Defendant first contends that the court officer's presence in the jury room constituted an improper influence as contemplated in *Walsh*. Officer Bills testified that after he was informed that the jury had reached its verdict, he entered the jury room to explain the next procedural steps. There is nothing in the record to suggest that Officer Bills engaged in any interaction with the jurors other than the type of "cordial relations" that normally arise between court officers and jurors. Nor is there any indication that Officer Bills made "any statements of law or prejudicial comments" to the jurors. *Id*. Moreover, the jury had completed its deliberations when Officer Bills entered the jury room to escort the jurors to the courtroom. Defendant has thus failed to show that a substantial

right has been adversely affected. *Adkisson*, 899 S.W.2d at 641-642. According, we do not find plain error. Tenn. R. App. P. 54(b).

Defendant also contends that the trial court erred in not declaring a mistrial when he entered the jury room and spoke to the jurors. In other words, Defendant seeks relief for an error that was occasioned by conduct in which he chose to engage. Relief may not be granted to a party responsible for an alleged error. Tenn. R. App. P. 36(a). Even were we to address Defendant's issue on the merits, Defendant has failed to show that the jury was improperly influenced during its deliberations by Defendant's conduct which occurred after the jury had reached its verdict and was waiting to be escorted back to the courtroom. Thus, we decline to address Defendant's issue of jury tampering as "plain error." Defendant is not entitled to relief on this issue.

VI. Consecutive Sentencing

Following a sentencing hearing, the trial court sentenced Defendant as a Range I, standard offender, to twenty-five years for his conviction of attempted premeditated first degree murder. The trial court found that Defendant was a dangerous offender for sentencing purposes, and ordered Defendant to serve his three sentences consecutively. Defendant does not challenge the length of his sentence for his attempted premeditated first degree murder conviction. Defendant contends, however, that the trial court erred in imposing consecutive sentencing. Defendant submits that he has no prior criminal history, and he contends that consecutive sentencing is not necessary to protect the public, nor is the aggregate sentence reasonably related to the severity of the offenses. *See* T.C.A. § 40-35-115(b)(4); *State v. Wilkerson*, 905 S.W.2d 933, 939 (Tenn. 1995).

When a defendant challenges the length or the manner of service of his or her sentence, this Court must conduct a *de novo* review with a presumption that the determinations made by the trial court are correct. T.C.A. § 40-35-401(d); *State v. Imfeld*, 70 S.W.3d 698, 704 (Tenn. 2002). This presumption, however, is contingent upon an affirmative showing in the record that the trial court considered the sentencing principles and all relevant facts and circumstances. *State v. Pettus*, 986 S.W.2d 540, 543-44 (Tenn. 1999). If the record fails to show such consideration, the review of the sentence is purely *de novo*. *State v. Shelton*, 854 S.W.2d 116, 123 (Tenn. Crim. App. 1992).

In making its sentencing determinations the trial court must consider: (1) the evidence presented at the sentencing hearing; (2) the pre-sentence report; (3) the principles of sentencing and arguments as to sentencing alternatives; (4) the nature and characteristics of the criminal conduct; (5) any appropriate enhancement and mitigating factors; (6) the defendant's potential or lack of potential for rehabilitation or treatment; and (7) any statements made by Defendant in his own behalf. T.C.A. §§ 40-35-103 and -210; *State v. Williams*, 920 S.W.2d 247, 258 (Tenn. Crim. App. 1995). The defendant bears the burden of showing that his sentence is improper. T.C.A. § 40-35-401(d), Sentencing Commission Comments; *State v. Ashby*, 823 S.W.2d 166, 169 (Tenn. 1991).

When a Defendant is convicted of multiple crimes, the trial court, in its discretion, may order the sentences to run consecutively if it finds by a preponderance of the evidence that a defendant falls

into one of seven categories listed in Tennessee Code Annotated section 40-35-115. In this instance, the trial court found that Defendant was "a dangerous offender whose behavior indicates little or no regard for human life, and no hesitation about committing a crime in which the risk to human life is high." T.C.A.§ 40-35-115(a)(4). If the trial court rests its determination of consecutive sentencing on this category, the court must make two additional findings. *Imfeld*, 70 S.W.3d at 708. First, the trial court must find that an extended sentence is necessary to protect the public from further criminal conduct by Defendant, and, second, it must find consecutive sentencing to be reasonably related to the severity of the offenses. *Wilkerson*, 905 S.W.2d at 939. Although such specific factual findings are unnecessary for the other categories enumerated in Tennessee Code Annotated section 40-35-115(b), the imposition of consecutive sentences is also guided by the general sentencing principles that the length of a sentence be 'justly deserved in relation to the seriousness of the offense' and 'no greater than that deserved for the offense committed.'" *Imfeld*, 70 S.W.3d at708 (quoting T. C. A. §§ 40-35-102(1) and -103(2)); *State v. Lane*, 3 S.W.3d 456, 461 (Tenn. 1999).

The trial court based its imposition of consecutive sentencing on its finding that Defendant was a dangerous offender. *See* T.C.A. § 40-35-115(b)(4). The trial court stated,

> [Defendant] is clearly a dangerous offender whose behavior indicates little or no regard for human life and no hesitation about committing a crime in which the risk to human life is high. He gets mad over an engine and goes and kills two people and leaves another one for dead. Had there been other individuals there, he obviously would have killed them, it would appear, so that he is a dangerous offender. This is an inexcusable crime and an inexcusable loss of life over something that, it does boggle the mind, so the aggregate term, I'm going to find, of consecutive sentences on all counts reasonably relates to the severity of the offenses, and society needs to be protected from [Defendant] for as long as it possibly can because he has demonstrated, just on the facts of this case, that he [is] a person who needs to be removed from society for as long as possible, so consecutive [sic].

The record demonstrates that the trial court adequately considered the principles of sentencing and all relevant facts and circumstances, including the *Wilkerson* factors. Based on our review, we conclude that the trial court did not err in imposing consecutive sentencing. Defendant is not entitled to relief on this issue.

CONCLUSION

For the foregoing reasons, the judgments of the trial court are affirmed.

_____

THOMAS T. WOODALL, JUDGE